BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AARON TOMPKINS	)	
Claimant	)	
VS.	)	
	)	
TOM BURGE FENCE & IRON INC.	)	
Respondent	)	
AND	)	**Docket No. 253,433**
	)	
AMERICAN STATES INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent requests review of a preliminary order entered by Administrative Law Judge Steven J. Howard on October 11, 2000.

ISSUES

Is the claimant barred from recovery pursuant to the alcohol defense in K.S.A. 44-501(d)(2)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant sustained injury arising out of and in the course of his employment on January 17, 2000, when he fell approximately 15 feet from a retaining wall onto a concrete parking lot. At the time of the accident the claimant was working with two co-workers building a fence adjacent to the retaining wall. The claimant's supervisor was holding a fence post upright while the claimant shoveled cement from a wheelbarrow into the post hole. As the claimant shoveled cement from the wheelbarrow it became unbalanced and tipped over. The claimant testified that a handle on the wheelbarrow struck his upper thigh and pushed him off the retaining wall. He then fell onto the concrete parking lot below the retaining wall.

The claimant sustained a comminuted left tibial fracture and a distal fibular fracture of the left ankle which required surgical repair consisting of insertion of screws, a plate and an external fixator.

The claimant's supervisor, Gordon Caudill, and a co-worker, Charles Dike, both testified that at lunch on the day of the accident the claimant and Mr. Dike had together consumed two pitchers of beer. Mr. Caudill claimed he did not drink any of the beer. Neither Mr. Caudill nor Mr. Dike could state how many glasses of beer the claimant had consumed and they just assumed the beer was shared about equally between Mr. Dike and the claimant. The claimant testified that he did not recall having beer with lunch on the day of the accident. He admitted that on prior occasions the three would sometimes have beer with lunch but he further testified that on those occasions they had never shared more than a pitcher.

Emergency room records under the column "LAST ATE/DRANK" contain the notation "1130-lunch" and below that notation "CB beer". The same record further notes that the claimant was alert, oriented and cooperative. There is no further mention of alcohol in the medical records and no contemporaneous samples were taken for alcohol content analysis.

The employer contends it is not liable under the workers compensation act because the claimant's consumption of alcohol contributed to the accident. K.S.A. 44-501(d)(2).

The respondent provided a toxicologist with information regarding claimant's height and weight and the fact that claimant had consumed 60 ounces of beer over the lunch hour. Based on this information the toxicologist used the Widmark curve to determine the claimant's blood alcohol content at the time of the accident. The toxicologist concluded that at approximately 2 p.m. the claimant's blood alcohol content was .095 percent. He further opined that claimant would have been impaired at the time of the accident and his impairment contributed to the accident.

As previously noted, there were no chemical tests performed to determine the claimant's blood alcohol content. The testimony of the toxicologist is based entirely upon a sequence of factors which must all be assumed as true, otherwise, the weight to be accorded his conclusion regarding the blood alcohol content is minimized. The record does not contain evidence regarding the alcohol content of the beer. Neither the supervisor nor the co-worker could specify how many glasses of beer the claimant had actually consumed. The testimony was that they assumed the beer was shared equally. The assumption of equal consumption is suspect when it is noted that the supervisor detailed that the claimant also ate a meal but that Mr. Dike only had beer at lunchtime. The information that a pitcher of beer contained approximately 64 ounces of beer and the height and weight of the claimant were uncontradicted and the remainder of assumptions upon which the toxicologist based his opinion were controverted.

In addition to establishing that the claimant was impaired the respondent also has the burden of proving that the impairment contributed to the accident in order to successfully utilize the alcohol defense. There was no testimony that prior to the accident

the claimant was exhibiting any of the conditions that the toxicologist said an individual with a blood alcohol content of .095 would display. Instead the claimant was performing his normal job duties of mixing cement in the wheelbarrow and shoveling the cement into a post hole. The claimant's supervisor never testified that claimant demonstrated impaired balance, impulsive behavior, impaired coordination or reflexes. Additionally, the supervisor had the claimant working 2 feet away from a 15 foot drop off.

It was uncontroverted that the claimant was shoveling from between the arms of the wheelbarrow. When the wheelbarrow tipped over the arm of the wheelbarrow either pushed the claimant off the retaining wall or he jumped out of the way of the arm and fell from the retaining wall. There is no evidence to demonstrate that even if the claimant was impaired, how such impairment contributed to the accident. Moreover, it is disingenuous for the supervisor to assert that alcohol would affect the claimant's balance and then allow him to work next to the retaining wall if he had a concern about the claimant's balance being impaired.

Lastly, the Board notes that for a supervisor to witness and allow employees to drink alcohol at lunch and then subsequently assert the alcohol defense after an injury occurs is analogous to an employer relying upon a horseplay defense to a workers compensation claim where the employer is aware of the horseplay and has taken no action to prohibit such activity. In such instances an employer cannot condone or permit prohibited activity and then use the prohibited activity as a defense to any subsequent claim.

The Board finds where there is conflicting testimony and other conflicting evidence contained in the record, it is significant that the Administrative Law Judge had the opportunity to judge the credibility of the claimant. Finding that the claimant was entitled to temporary total disability and medical compensation, the Administrative Law Judge had to believe claimant's testimony. The Board finds, as it has in the past, that some deference should be given to the Administrative Law Judge's conclusions because he had the opportunity to assess the claimant's credibility. Therefore, the Board concludes the Administrative Law Judge's preliminary hearing Order should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Board that the preliminary order entered herein by Administrative Law Judge Steven J. Howard on October 11, 2000, should be and is hereby affirmed.

Dated this ____ day of January 2001.

BOARD MEMBER

pc: James M. Sheeley, Attorney at Law
Clifford K. Stubbs, Attorney at Law
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director